Foreword

by Hon. Michael Beloff QC

I must declare an interest at the outset. I am in favour of the main thrust of the Government's trio of reforms, which the two Bright Young Things, authors of this provocative book, have described with a title part tabloid – part broadsheet. But I consider that the merits of the proposals were in inverse proportion to the merits of their presentation. The haste and secrecy with which the programme was announced was as unnecessary as it was counterproductive. Interest rate adjustment or invasion of enemy territory may require an element of surprise; constitutional change should be slow of gestation. If this was spin, then I can only conclude that the wicket was not turning.

But my support for the measures is conditioned by a sense of their inevitability, and accompanied by a soupçon of regret. All three seem to me to have a single source – the provision in Article 6 of the European Convention of Human Rights which makes mandatory an 'independent and impartial tribunal', reflecting the Roman law principle Nemo Judex in Causa Sua and Lord Hewart's oft misquoted

dictum "Justice should not only be done but should manifestly and undoubtedly be seen to be done" (a competent sub-editor should have cut the adverbs). Neither a member of the executive (the Lord Chancellor) nor members of the legislature (the Law Lords) can on the basis of this rule be acceptable judges and – to revert to the tenant of the Woolsack – nor can he be the actual source of judicial appointment and preferement. If Westminster had not spoken sooner, Strasbourg could have done so later.

My regret is that the compelling case for change rests more in austere theory than in practical experience [although if the new Supreme Court is properly housed and provided for, and if the Secretary of State for Constitutional Affairs can become, as Lord Falconer intends, a deliverer of an effective legal system, tangible benefits will be the by-product of, if not the underlying motive for, the agenda].

The Lord Chancellor's judicial appointments have over the whole of my professional lifetime been of the highest calibre available to him; and the notion that politics nowadays enters the equation is exploded by Tory Lord Mackay's promotion of Stephen Sedley, a man of the left if ever there was one. The Law Lords' interventions in debates in the House have been pertinent. No one can identify any case where the content of the judicial decisions of either Lord Chancellor or Law Lords was actually affected adversely, indeed at all, by their triple or double roles, and virtually none where it might to the reasonable bystander have seemed so. Is it coincidence that the reputation of our highest judiciary is itself of the highest, away, it may perversely be, more than at home?

It is vital that the new system for judicial appointments, in my view, the key element of the package, be entirely free of the taint which is said to afflict the status quo. My espousal of a Commission in my Atkin Lecture in 1999 was a response to powerful cries by the Hague-led opposition for applicant-judges to be submitted to Parliamentary

scrutiny in the manner of Supreme Court nominees in the USA. Quis custodiet ipsos custodies? In my view both the criteria for the Commission and the criteria for appointment to the bench should be written in statutory stone, and should emphasise the core values of impartiality and independence. The Commission cannot be or be seen to be the creature of the Government in power. Nor can it be permitted to succumb to the lures of political correctness: merit, not gender or racial diversity must be the touchstone of appointment. A seemingly two-tier judiciary within the same level in the judicial hierarchy would be destructive, not productive of justice.

And I believe too that the Chairman or Chairwoman must be a lawyer – why not the Lord Chief Justice? My service as Chairman of the Judicial Sub-Committee of the Senior Salaries Review Board convinced me that the advantages of insider knowledge outweigh the disadvantages of subconscious partisanship.

I have abstained from comment on the threat that hangs over the QC system, because my conflict of interest as commentator and silk is too palpable. The relevant proposal was Lord Irvine's last throw, not Lord Falconer's first. I content myself with observing that it was odd that no thought seems to have been given to the reaction of those countries in the Commonwealth that have continued to favour two ranks of Counsel, and I hope that their view will now be canvassed and paid heed to.

Modernisation is à la mode and the authors have vastly advanced the debate, with a judicious blend of "yes – if" as well as "yes – but". But some respect must be paid too to our national traditions. History after all is the major architect of constitutions: and unless we as citizens remember whence we came, we may not know whither we should go.

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